No. 05-85

In the Supreme Court of the United States

POWEREX CORP.,

Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PROVINCE OF BRITISH COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROY T. ENGLERT, JR.*
RACHEL S. LI WAI SUEN
MATTHEW R. SEGAL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Ninth Circuit's Inflexible, Truncated Approach To Determining "Organ" Status Under The FSIA Is Fundamentally Inconsistent With The Policies and Purpose Of The FSIA	6
II. The Ninth Circuit's Narrow, Mechanical Approach To The FSIA Resulted In The Erroneous Denial Of "Organ" Status To Powerex	11
III. Applying Section 1447(d) to Cases Removed Under the Foreign Sovereign Immunities Act Would Expose Foreign States to Prejudice, Impair Foreign Relations, and Undermine Congress's Comprehensive Scheme for Transferring to the Federal Courts Issues of Foreign Sovereign Immunity	22
CONCLUSION	28

TABLE OF AUTHORITIES

Page(s)

CASES

United States

Davis v. *McCourt*,
226 F.3d 506 (6th Cir. 2000) 7

Dole Food Co. v. *Patrickson*,
538 U.S. 468 (2003) 15

EIE Guam Corp. v. *Long Term Credit Bank of Japan, Ltd.*,
322 F.3d 635 (9th Cir. 2003) 8

EOTT Energy Operating Ltd. P'ship v. *Winterthur Swiss Ins. Co.*, 257 F.3d 992 (9th Cir. 2001) 8, 15

Filler v. *Hanvit Bank*,
378 F.3d 213 (2d Cir.), *cert. denied*,
543 U.S. 1022 (2004) 7, 10

Gates v. *Victor Fine Foods*,
54 F.3d 1457 (9th Cir. 1995) 7, 8

In re Linee Aeree Italiane (Alitalia),
469 F.3d 638 (7th Cir. 2006) 24

In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig.,
15 F.3d 1230 (3d Cir. 1994) 5, 23

In re TMI Litig. Cases Consol. II,
940 F.2d 832 (3d Cir. 1991) 23

Kelly v. *Syria Shell Petroleum Dev. B.V.*,
213 F.3d 841 (5th Cir. 2000) 7, 8, 10

Kircher v. *Putnam Funds Trust*,
126 S. Ct. 2145 (2006) 23

Metropolitan Cas. Ins. Co. v. *Stevens*,
312 U.S. 563 (1941) 23

TABLE OF AUTHORITIES—continued

Page(s)

Nolan v. *Boeing Co.*,
919 F.2d 1058 (5th Cir. 1990) 26

Osborn v. *Haley*,
127 S. Ct. 881 (2007) 24-27

Ruggiero v. *Companic Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872 (2d Cir. 1981) 25

Thermtron Prods., Inc. v. *Hermansdorfer*,
423 U.S. 336 (1976) 4, 5, 22, 25

Universal Consol. Cos., Inc. v. *Bank of China*,
35 F.3d 243 (6th Cir. 1994) 24

USX Corp. v. *Adriatic Ins. Co.*,
345 F.3d 190 (3d Cir. 2003) 7, 10, 15

Verlinden B.V. v. *Cent. Bank of Nigeria*,
461 U.S. 480 (1983) 5, 6, 26

Canada

Jaffe v. *Miller*,
13 O.R. (3d) 745 (C.A. 1993) 10

P.(R.) v. *Westwood*,
2003 B.C.S.C. 1279 (B.C. 2003) 10

Re Canada Labour Code,
2 S.C.R. 50 (Can. 1992) 9, 10

Sarafi v. *The "Iran Afzal,"*
2 F.C. 954 (Tr. Div. 1996) 10

Walker (Litig. Guardian of) v. *Bank of New York, Inc.*,
16 O.R. (3d) 504 (C.A. 1994) 9-10

Westbank First Nation v. *British Columbia Hydro & Power Auth.*, 154 D.L.R. (4th) 93 (C.A. 1997), *aff'd*, 3 S.C.R. 134 (1999) 14

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, REGULATIONS, AND RULES

United States

28 U.S.C. § 1441(d) 23

28 U.S.C. § 1447 ..... *passim*

28 U.S.C. § 2679(d)(2) 25

Foreign Sovereign Immunities Act,
28 U.S.C. § 1602 *et seq.* 26

28 U.S.C. § 1603 ..... *passim*

28 U.S.C. § 1604 6

Canada

Auditor General Act,
R.S.B.C., ch. 2 (2003) 18

British Columbia Supreme Court Rules,
Civil Rules 39(24) -(26), B.C. Reg. 221/90 24

Budget Transparency and Accountability Act,
R.S.B.C., ch. 23 ..... 17, 19

Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), *reprinted in* R.S.C. 1985, App. II, No. 5, § 125 16

Financial Administration Act,
R.S.B.C., ch. 138 (1996) 11, 12

§ 4.1 17

§ 8(2)(c)(ii) 17

§ 30 16

§ 53 16

TABLE OF AUTHORITIES—continued

Page(s)

§ 56.3 16

§ 75(1)(a) 17

§ 79.3 17

Financial Information Act, R.S.B.C., ch. 140, § 4 (1996) 17

Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993) 17

Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996) 11

State Immunity Act, R.S.C., ch. S-18 (1985) 9

LEGISLATIVE MATERIALS

United States

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... 23, 24

Canada

Official Report of the Debates of the Legislative Assembly (Hansard), 36th Parliament, 5th Session (Apr. 9, 2001) 20

Official Report of the Debates of the Legislative Assembly (Hansard), 38th Parliament, 2d Session (Apr. 24, 2006) 21

MISCELLANEOUS

BC Hydro, *2001 Annual Report* (June 2001), *available at* http://www.bchydro.com 19

TABLE OF AUTHORITIES—continued

Page(s)

BC Hydro, *2005 Annual Report* (June 2005), *available at* http://www.bchydro.com 19

BC Hydro, *2006 Annual Report* (May 2006), *available at* http://www.bchydro.com 18, 20

BC Hydro, *Company History*, *available at* http://www.bchydro.com 11

BC Hydro, *Our System*, *available at* http://www.bchydro.com 1

British Columbia Utilities Commission, *In the Matter of British Columbia Hydro and Power Authority 2004/05 to 2005/06 Revenue Requirements Application and British Columbia Transmission Corporation Application for Deferral Accounts* (Oct. 29, 2004), *available at* http://www.bcuc.com 19

Michael McCullough, *Olympics brings cheer to otherwise troubled year*, VANCOUVER SUN, Dec. 31, 2003, *available at* Westlaw, PapersCan 20

Shareholder's Letter of Expectations between The Minister Energy and Mines (as Representative of the Shareholder, the Government of British Columbia) and the Chair of the British Columbia Hydro and Power Authority, Feb. 2004, *available at* http://www.gov.bc.ca/cas/down/ 12

Scott Simpson, *Market fired Powerex bonanza*, VANCOUVER SUN, May 18, 2002, *available at* Westlaw, PapersCan 20

Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order of the Lieutenant Governor in Council No. 1125 (Nov. 27, 2003) 19

TABLE OF AUTHORITIES—continued

Page(s)

Wendy Stueck, *U.S. gives Powerex 'exoneration,'* THE GLOBE AND MAIL, Nov. 1, 2003, *available at* Westlaw, CanadaNP 12

14 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (1984) 26

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Province is the sole owner of the BC Hydro and Power Authority ("BC Hydro"). In turn, BC Hydro is the sole owner and shareholder of petitioner Powerex. BC Hydro is one of the largest electric utilities in Canada. It is responsible for the generation and distribution of energy to approximately 94% of the Province's population. BC Hydro, *Our System*, *available at* http://www.bchydro.com. Powerex was created by Provincial statute for the public purpose of marketing the Province's surplus power outside the Province. See Hydro and Power Authority Act, R.S.B.C. ch. 12 (1996) (Pet. App. 163a); Pet. App. 53a. To that end, Powerex actively markets the Province's electric power in the western United States.

Powerex's commercial activities in the United States expose Powerex to suit in the United States, and ultimately expose BC Hydro and the Province to potential liability for any judgment that might be entered against Powerex. Any business losses incurred by Powerex are, in the end, absorbed by its ultimate parent, the Province. The burden and expense of Powerex's defense of litigation in the United States are likewise ultimately borne by the Province and its citizens.

The Province is concerned that the decision below reaches a wrong result – one that deprives the Province and its organs of protections the U.S. Congress gave them – by setting and

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

applying a rigid, mechanical standard that is flatly inconsistent with both the law and the policy of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 ("FSIA"). Indeed, if upheld, the precedent set by the decision below – one that is at odds with the Ninth Circuit's own previous case law and with the contextual approach adopted by other circuits – will leave numerous other Canadian instrumentalities vulnerable to suit in U.S. state courts. Likewise, if this Court holds that the federal courts do not have jurisdiction to reverse erroneous remand orders in cases removed under the FSIA, such as the remand order below, instrumentalities of foreign states will be subject to inevitably inconsistent and incorrect holdings concerning when they can be sued in state court. Those possibilities have not played into the risk calculations of the Province and its organs in their decisions to engage in commerce in the United States. Therefore, the *amicus* Province has an interest in the reversal of the decision below, and the restoration of the context-sensitive approach to determining "organ" status under the FSIA.

SUMMARY OF ARGUMENT

Under the Foreign Sovereign Immunities Act, an entity qualifies for certain procedural protections if it qualifies as a "foreign state," which is defined to include "an organ" of the foreign state. See 28 U.S.C. § 1603(b)(2). This case arises from the erroneous denial of "organ" status under Section 1603(b)(2) of the FSIA to Powerex, a wholly owned subsidiary of BC Hydro, a Canadian Crown corporation that is, in turn, wholly owned by the Province of British Columbia.

Mindful of the reality that American courts are likely to be unfamiliar with foreign corporate structures and methods of corporate organization, several circuits apply a flexible, contextual test to determine whether an entity constitutes an "organ" of a foreign government under the FSIA. In the decision below, however, the Ninth Circuit applied the "organ" prong to Powerex in a ruthlessly technical manner. The court of appeals stated that

Powerex "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." Pet. App. 15a-16a. Although it grudgingly acknowledged evidence that Powerex serves a public function, the court asserted that Powerex exhibited a "high degree of independence" from the Province. *Id.* at 16a. That alleged "independence," in combination with Powerex's supposed "lack of financial support from the government and its lack of special privileges or obligations under Canadian law," "dictate[d]" the court's holding that Powerex was not an "organ" of the Province. *Ibid.* This Court should reverse that holding.

I. This Court should apply the broad, context-specific test adopted by most of the federal courts of appeals. To further its goal of protecting foreign sovereigns – even when they are not completely immune – from any local bias that may be present in a jury trial in state court, Congress intended that courts apply a broad, flexible, and realistic test to assess "organ" status. Relevant factors include the reasons for an entity's creation, whether the entity serves a public purpose or holds an exclusive right to something in the foreign nation, how the entity is treated under the foreign sovereign's laws, the degree of supervision the foreign government exercises over the entity, and whether the foreign state requires the entity to hire civil servants. The absence of one or more factors cannot be dispositive against "organ" status.

Canadian courts, just like most federal courts of appeals in the United States, have applied a contextual approach to questions of sovereign status. Canadian courts have been generous in recognizing sovereign status for entities that meet criteria similar to those discussed in the U.S. cases. The practice of the Canadian courts is additional reason for this Court to apply a broad, flexible, and realistic test rather than the myopic and grudging approach the Ninth Circuit applied below.

II. The court of appeals ignored – but this Court should give weight to – a wealth of record evidence demonstrating that Powerex serves a public purpose, was *expressly created* to serve that public function, and holds *exclusive* rights in the Province to serve that important public duty. Furthermore, the court paid no heed to the extensive supervision and control that the Province exercises over Powerex, the numerous special privileges that Powerex enjoys under Canadian law, and the degree to which the profits and losses of Powerex are integrated with those of BC Hydro, with Provincial citizens ultimately enjoying the benefits and bearing the burdens of the interdependent relationship between Powerex and the Province. Confusing the *indirectness* of the Province's ownership of Powerex (through BC Hydro) with *incomplete* ownership of Powerex, the court of appeals stated – indefensibly – that Powerex is "not wholly owned by the government." Pet. App. 15a-16a. Powerex is wholly owned by the Province, and to hold the indirectness of that ownership against "organ" status is indefensible because directly owned subsidiaries do not need to argue for "organ" status, but rather are protected by separate language in 28 U.S.C. § 1603(b)(2). A correct analysis of the factors that ought to govern "organ" status makes it overwhelmingly clear that Powerex is an organ of the Province.

III. This Court also requested that the parties address the applicability of 28 U.S.C. § 1447(d). Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In general, this provision acts to bar appeals of remand orders issued under Section 1447(c), which permits remand when, at the time of removal, there is a lack of subject-matter jurisdiction or a defect in the removal procedure. See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976).

The Ninth Circuit correctly concluded that, notwithstanding 28 U.S.C. § 1447(d), it had appellate jurisdiction over the district

court's remand order. Section 1447(d) applies only when the order of remand was authorized by Section 1447(c), which permits remand in two situations: where there is a lack of subject-matter jurisdiction, or where there is a defect in removal procedure. See *Thermtron*, 423 U.S. at 346. As neither ground was present here, the order of remand could not have been authorized under Section 1447(c). Section 1447(d) thus cannot apply to preclude appellate review in this case.

Applying Section 1447(d) to bar appellate review of cases removed under the FSIA runs counter to the FSIA's purposes. The FSIA reflects congressional intent to establish a comprehensive statutory scheme that would transfer jurisdiction over issues of foreign sovereign immunity to the federal courts. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (FSIA's overarching purpose is to "channel cases against foreign sovereigns away from the state courts and into federal courts"). The advantage of this framework is that foreign sovereigns are protected from local bias in state courts. See *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1239 (3d Cir. 1994). Applying Section 1447(d) apply to preclude appellate review of cases removed under the FSIA would have adverse consequences for foreign relations, particularly because, since the advent of the FSIA, foreign sovereigns have come to expect respectful and uniform treatment in litigation in the United States.

ARGUMENT

I. The Ninth Circuit's Inflexible, Truncated Approach To Determining "Organ" Status Under The FSIA Is Fundamentally Inconsistent With The Policies and Purpose Of The FSIA

A. The FSIA is designed to protect foreign governments from needless litigation in the United States, and to ensure that foreign sovereign immunity decisions are based on legal, rather than political or foreign policy, grounds, thus allowing foreign governments to arrange their affairs according to a settled and consistent set of legal guidelines. *Verlinden*, 461 U.S. at 488. The Act provides a broad grant of legal immunity to foreign governments. The statute provides that, in general, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" subject to certain exceptions. 28 U.S.C. § 1604. Should an exception apply, as is the case here, the FSIA accords respect to the foreign sovereign by providing the sovereign with procedural benefits, namely the right to defend lawsuits in federal, rather than state, court, and the right to be tried without a jury.

To qualify as a "foreign state" under the FSIA, and benefit from those procedural protections, the entity must meet certain standards. A "foreign state" is defined as any "agency or instrumentality of a foreign state" (28 U.S.C. § 1603(a)), which in turn is defined as:

> any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof, and (3) which is neither a citizen of a State of the United States * * * nor created under the laws of any third country.

Id. § 1603(b). The criterion in dispute in this case is Section 1603(b)(2), whether the entity is "an organ of a foreign state."

The general rule is that the term "organ" as it is used in the FSIA is to be interpreted broadly. *Gates* v. *Victor Fine Foods*, 54 F.3d 1457, 1460-1461 (9th Cir. 1995). That principle is consistent with the touchstone of the FSIA: that, in general, foreign sovereigns should be spared the inconvenience, indignity, and expense of litigating in the United States, and, where the foreign government is not entitled to immunity, it is at a minimum entitled to certain procedural safeguards, such as the right to litigate in federal court and be tried without a jury. In granting such protections in the litigation process to foreign sovereigns, the FSIA attempts to "remove any local bias that might be present at a jury trial in a state court." *Davis* v. *McCourt*, 226 F.3d 506, 511 (6th Cir. 2000).

Consistent with the broad approach to "organ" status, the Second, Third, and Fifth Circuits correctly apply a context-sensitive, multi-factor analysis to the "organ" prong of Section 1603. Those courts analyze the entity's status in light of a host of overlapping factors, including the reasons for the entity's creation, whether the entity serves a public purpose or holds an exclusive right to something in the foreign nation, how the entity is treated under the foreign sovereign's laws, the degree of supervision exercised by the foreign government over the entity, and whether the foreign state requires the entity to hire civil servants. See, *e.g.*, *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 206-214 (3d Cir. 2003); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-848 (5th Cir. 2000). Those circuits recognize that, in the spirit of the FSIA and the principle of respect between sovereign nations, it is important to analyze the complete picture of the entity's relationship to the foreign government.

Other circuits also recognize that it is equally important to conduct a *balanced* analysis. Mechanically applying a closed universe of factors or "requir[ing] that all [factors] support an organ-determination" creates a truncated and inaccurate picture of the entity's status. *Kelly*, 213 F.3d at 847. Thus, no single factor in the contextual analysis should be dispositive in the "organ" analysis. See *EIE Guam Corp.* v. *Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640-641 (9th Cir. 2003) (organ status is appropriate even where the entity enjoys "some autonomy" from the foreign state in light of "district court's key assertion" that the entity served a public purpose); *EOTT Energy Operating Ltd. P'ship* v. *Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (organ status appropriate even where the foreign state is "not involved in the day-to-day activities" of the entity); *Gates*, 54 F.3d at 1461 (same).

Rather than conduct a balanced, nuanced analysis of Powerex's status, the court below short-circuited the contextual test under the FSIA. The Ninth Circuit denied Powerex "organ" status because it concluded that Powerex

> was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. Even though petitioner offers some evidence that it serves a public purpose, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [Powerex] is not an organ of British Columbia.

Pet. App. 15a-16a.

That passage represents a misapprehension of both the law and the facts. The court of appeals omitted examination of numerous factors showing a high degree of interdependence

between the Province and Powerex. The court also ignored or misconstrued key elements of the relationship between the Province and Powerex, despite undisputed and overwhelming evidence on the record demonstrating that Powerex is a public entity. See pp. 9-20, *infra*.

B. Another reason for this Court to reject the mechanical "checklist" approach adopted in the decision below is that it stands in stark contrast to the broad contextual test that Canada applies to questions of foreign sovereign immunity.

The source of foreign sovereign immunity in Canada is its State Immunity Act, R.S.C., ch. S-18 (1985) ("SIA"), which was largely patterned after the FSIA. *Re Canada Labour Code*, 2 S.C.R. 50, ¶ 13 (Can. 1992). Like its American counterpart, the SIA grants immunity to "foreign states" from the jurisdiction of Canadian courts. A "foreign state" is defined by the SIA as "any political subdivisions of the foreign state, including any of its departments, and any *agency* of the foreign state." R.S.C., ch. S-18, § 2 (emphasis added). In turn, an "agency" of a foreign state is defined as "any legal entity that is an *organ* of the foreign state but that is separate from the foreign state." *Ibid.* (emphasis added). The underlying policy of the Canadian State Immunity Act, like that of the FSIA, is recognition of the principle of mutual respect between sovereign nations, as well as an acknowledgment of the delicate political and legal compromise inherent to the doctrine of international immunity.

Canadian courts have generously defined the outer limits of sovereign immunity under the SIA. The highest court in Ontario, for instance, has correctly observed that "the use of the broad word 'organ' in the [State Immunity] Act, which was promulgated to codify the application of the doctrine [of sovereign immunity] in Canada, indicates the intention of [the Canadian] [P]arliament to protect individuals and institutions who act at the request of a foreign state in situations where that state would enjoy sovereign immunity." *Walker (Litig.*

Guardian of) v. *Bank of New York, Inc.*, 16 O.R. (3d) 504, ¶ 10 (C.A. 1994) (holding that the Bank and its employees were "organs" of the United States entitled to immunity); see also *Jaffe* v. *Miller*, 13 O.R. (3d) 745, ¶¶ 31-32 (C.A. 1993) (functionaries of an agency of a foreign government were entitled to immunity under the SIA); *P.(R.)* v. *Westwood*, 2003 B.C.S.C. 1279, ¶ 19 (B.C. 2003) (same).

Like the Second, Third, and Fifth Circuits, Canadian courts have adopted a fact-specific, case-by-case approach to determining sovereign immunity, examining the circumstances of an entity's creation, as well as the entity's responsibilities and obligations under foreign law, in recognition that foreign states often use complex corporate structures or organizational models with which Canadian courts may not be familiar. In light of this reality, as the Canadian Supreme Court has observed, "a contextual approach is the only reasonable basis of applying the doctrine of * * * immunity." *Re Canada Labour Code*, 2 S.C.R. at ¶ 30; accord *Filler*, 378 F.3d at 217; *USX Corp.*, 345 F.3d at 206-214; *Kelly*, 213 F.3d at 846-848. The "lesson" to be drawn from the American model, the FSIA, is that "the proper approach to characterizing [foreign] state activity is to view it in its *entire context*." *Re Canada Labour Code*, 2 S.C.R. at ¶ 36 (emphasis added); see also *Sarafi* v. *The "Iran Afzal,"* 2 F.C. 954, ¶¶ 6, 9 (Tr. Div. 1996) (a shipping line created by the Iranian government to hold the assets of a nationalized line was an "agency" of Iran). "Rigid dichotomies" or mechanical analyses, such as the one adopted by the Ninth Circuit, are "not helpful" to the analysis of sovereign immunity. *Re Canada Labour Code*, 2 S.C.R. at ¶¶ 26, 30.

II. The Ninth Circuit's Narrow, Mechanical Approach To The FSIA Resulted In The Erroneous Denial Of "Organ" Status To Powerex

The Ninth Circuit's analysis of Powerex's entitlement to "organ" status was flawed from start to finish. Not only did the Ninth Circuit completely overlook crucial evidence in the record establishing the essentially public nature of Powerex, but the court also misapprehended key facts defining the Province-Powerex relationship.

- Powerex was created for a public purpose, and is frequently used by the Province to fulfill public obligations.

The Ninth Circuit grudgingly acknowledged "some evidence that [Powerex] serves a public purpose" (Pet. App. 16a) but virtually ignored the circumstances surrounding the birth of Powerex. In 1964 the Province passed what is now called the Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996) ("Hydro Act") (Pet. App. 163a), creating a new Crown corporation that came to be known as BC Hydro. Pet. App. 50a, 162a-189a. In the 1980s, the Province undertook a massive re-structuring of BC Hydro. As part of that project, Powerex came into being in December 1988. BC Hydro, *Company History*, *available at* http://www.bchydro.com; see also Pet. App. 53a; Pet. Br. 10.

Powerex was created for one purpose: to act as the *exclusive* marketer of the Province's surplus power outside of British Columbia, for the benefit of British Columbia's citizens. Pet. App. 53a. As a wholly owned subsidiary of BC Hydro, Powerex satisfies the requirements for a government corporation under the Province's Financial Administration Act, R.S.B.C., ch. 138, § 1 (1996) ("FAA"). Therefore, Powerex is ultimately accountable to the Provincial government, making it subject to certain obligations and responsibilities. As a government entity, Powerex is also entitled to certain rights and benefits under

Provincial law that are not applicable to private businesses. See *ibid.* By structuring Powerex this way, the Province ensured that, although Powerex would have the flexibility necessary to participate actively in the energy market, in the end the Province would retain control through the series of checks and balances imposed by Provincial law on government corporations.

BC Hydro itself does not and cannot conduct any outside marketing of its surplus electricity. BC Hydro does not possess an export permit from FERC, and is thus prohibited by the National Energy Board from exporting power to the United States for money. Pet. App. 24a. As a result, the Province and BC Hydro are entirely dependent on Powerex for the outside marketing of BC Hydro's electrical products. Powerex is the sole entity in the Province with the exclusive authority to market BC Hydro's surplus energy outside of British Columbia, to western Canada and the western United States. Pet. App. 24a. BC Hydro is directed, by its sole shareholder, the Province, "*through Powerex*, [to] continue to be an active participant in extra-provincial energy trading markets." Shareholder's Letter of Expectations between The Minister Energy and Mines (as Representative of the Shareholder, the Government of British Columbia) and the Chair of the British Columbia Hydro and Power Authority, Feb. 2004 (emphasis added), *available at* http://www.gov.bc.ca/cas/down/.

Thus, Powerex works closely with BC Hydro to deliver electricity to the United States. BC Hydro transfers its surplus energy to Powerex at the British Columbia-U.S. border. Pet. App. 24a. BC Hydro's system of dams and reservoirs allows Powerex to purchase electricity on the open market during non-peak hours when prices are low and sell its own electricity supplies during peak hours. Wendy Stueck, *U.S. gives Powerex 'exoneration,'* THE GLOBE AND MAIL, at 2, Nov. 1, 2003, *available at* Westlaw, CanadaNP; see also Pet. App. 28a-29a ("[h]our-to-hour coordination takes place between the BC Hydro

operations shift engineer and the Powerex Real Time trader"). Powerex's purchases also supplement the BC Hydro system to serve domestic customers in years when rain and snow-melt inflows into BC Hydro's reservoirs are low.

Other duties carried out by Powerex underline its essentially public nature and undermine the Ninth Circuit's dismissal of Powerex as just another for-profit company. The Province has assigned Powerex its rights and obligations under the Columbia River Treaty and the Skagit River Treaty, international treaty arrangements between Canada and the United States for the effective utilization of the water resources of both nations. Pet. App. 53a-57a; see also *id.* at 61a, 138a. Specifically, the Province and BC Hydro assigned to Powerex their rights and interests under the Columbia River Treaty in the "Canadian Entitlement," Canada's half-share of surplus power produced on the Columbia River. *Id.* at. 55a. The Province and BC Hydro also assigned to Powerex the Province's responsibilities under the Skagit River Treaty concerning the transmission of power from the Province to Seattle. *Id.* at 56a-57a; see Pet. Br. 11-12.

The Province has often used Powerex to carry out other duties in the public interest. In the early 1990s the Province approved Powerex as the vehicle through which to create a domestic power exchange operation, which was intended to promote an efficient domestic market for private power. Pet. App. 54a. In addition, in 1997 the Province passed legislation giving the Provincial Government authority to define the terms under which Powerex would supply power to Provincial businesses, to "help ensure that British Columbia's electric power resources contribute to the creation and retention of jobs in British Columbia and to regional economic development." Power for Jobs Development Act, S.B.C., ch. 51, § 2 (1997); see also Pet. App. 55a-56a, 193a.

- Powerex is a wholly owned subsidiary of BC Hydro, which in turn is wholly owned by the Province.

Foreign sovereigns must have the necessary flexibility to use different forms of corporate organization; foreign methods of corporate structure may, however, be unfamiliar to American courts. The use of the broad term "organ" in the FSIA shows that Congress was cognizant of this reality, and intended to accommodate (to some degree) the need for foreign states to organize their corporate affairs according to their own methods. Accordingly, it should not be held against the Province that it chose to use its Crown corporation, BC Hydro, as a corporate middleman that would own Powerex.

To the puzzlement and dismay of the Province, the Ninth Circuit deemed it significant that Powerex "was not wholly owned by the [foreign] government." Pet. App. 15a-16a. This is a factual distortion, as the Province *does* wholly own Powerex, albeit through an intermediate sovereign entity: Powerex is a fully owned subsidiary of BC Hydro, which is a Crown corporation and an agent of the Province. Hydro Act, R.S.B.C., ch. 212, § 3(1). All of BC Hydro's property in turn belongs to the Province. *Westbank First Nation* v. *British Columbia Hydro & Power Auth.*, 154 D.L.R. (4th) 93, ¶¶ 12-13 (C.A. 1997) (property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"), *aff'd*, 3 S.C.R. 134 (1999). The Ninth Circuit confused the *directness* of ownership (arguably absent here) with the *completeness* of ownership (indisputably present here).

In any event, the Ninth Circuit's conclusion that Powerex's ownership structure cuts *against* conferring "organ" status is also a distortion of the law. Incomplete ownership by the foreign government cuts against only the "majority ownership" determination under Section 1603(b)(2) of the FSIA. 28 U.S.C. § 1603(b)(2) (defining an "agency or instrumentality of a foreign state" as "any entity * * * which is an organ of a foreign state or

a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof"); see also *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-74 (2003) ("indirect subsidiaries" of a foreign state do not meet the standard of majority ownership under Section 1603(b)(2)). But an "organ" determination under the FSIA is an altogether separate inquiry. It is unnecessary even to consider whether an entity is an "organ of a foreign state" if a court determines that it meets the independently sufficient statutory criterion that "a majority of [its] shares or other ownership interest is owned by a foreign state or political subdivision thereof," so suggesting that a failure to meet the latter criterion is a factor cutting against "organ" status makes no sense.

Before the decision below, the Ninth Circuit had correctly recognized – as had the Third Circuit – that complete but indirect ownership by the foreign sovereign weighs heavily *in favor of* "organ status." See *EOTT Energy*, 257 F.3d at 997 ("[i]n *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650 [,655] (9th Cir. 1996), we held that a Mexican oil refinery was an organ where it was entirely owned by the government [through a direct subsidiary of the government]"); *USX Corp.*, 345 F.3d at 213 (where foreign government had "complete control over all [the subsidiary's] shares * * *, albeit through a tiered arrangement," this factor "weighs in favor of a finding of organ status"). Those prior holdings recognized that tiered but complete ownership arrangements, such as the Province's ownership of Powerex, counsel strongly in favor of finding organ status even if they do not pass the FSIA's "majority ownership" test. Thus, the Ninth Circuit's erroneous transposition of the majority-ownership test and the "organ" test transformed a factor that should have favored Powerex into one that worked heavily against it in the "organ" analysis.

- Powerex enjoys numerous special privileges under Canadian law.

In denying Powerex "organ" status, the court relied on the fact that Powerex "was not immune from suit" in Canada to justify the denial of "organ" status. Pet. App. 15a. It is true that Powerex is not immune from suit in Canada. As Powerex is not, however, claiming immunity in the *United States* under the FSIA (because it clearly falls within the "commercial activities" exception to immunity), but is instead claiming the protections the FSIA gives a foreign state *even when it is not immune*, Powerex's lack of immunity in Canada should be accorded no significance. See U.S. Cert.-Stage Br. 10 n.4. And that is particularly so in light of the overwhelming evidence on the record establishing that Powerex holds special status under Canadian law.

To start, Powerex's profits are wholly exempt from both federal and provincial taxes, an advantage that private companies do not enjoy. The Constitution Act of Canada holds that "[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation." Constitution Act, 1867, 30 & 31 Vict., ch. 3, *reprinted in* R.S.C. 1985, App. II, No. 5, § 125 (Pet. App. 58a, 161a). As a Province-owned corporation, Powerex does not have to pay taxes.

Further benefits flow from Powerex's status as a public entity of the Province. Under the Financial Administration Act, Powerex, like all government corporations, can receive loans from the Province's Ministry of Finance, and is also eligible to have its debt obligations assumed by the Province. R.S.B.C., ch. 138, §§ 53, 56.3. Powerex also qualifies under Provincial law to receive insurance and risk management services from the Ministry of Finance. *Id.* § 30. Finally, unlike employees of private energy companies, Powerex's employees can participate in BC Hydro's retirement plan. JA247-248. The numerous advantages that Powerex enjoys by virtue of its relationship to the

Province and its status as a government corporation make it clear that the Ninth Circuit was simply wrong when it said that Powerex did not benefit from any "financial support" from the Province or "special privileges" under Canadian law. Pet. App. 16a.

- Powerex is subject to extensive Provincial supervision.

Numerous undisputed facts further lemonstrate the degree to which the Province, BC Hydro, and Powerex are intertwined. Powerex is subject to multiple statutory restraints. As a government corporation, Powerex is subject to any regulations and directives passed by the Provincial Treasury Board applicable to government corporations. See, *e.g.*, FAA, R.S.B.C., ch. 138, § 4.1 (in relation to capital expenditures). The Province can also impose restrictions on the circumstances under which Powerex can, for example, enter banking arrangements, lend or borrow money, or give guarantees and indemnities. *Id.* § 75(1)(a); see also *id.* § 79.3 (government corporations prohibited from entering into commodity derivative transactions unless permitted by a Treasury Board regulation and subject to any conditions imposed by such a regulation).

Powerex is also subject to financial disclosure obligations that are inapplicable to private sector companies. Because Powerex is a wholly owned subsidiary of BC Hydro, its financial information must be included in BC Hydro's statutorily mandated financial disclosures. Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993); see also Budget Transparency and Accountability Act, R.S.B.C., ch. 23, §§ 13, 16 (2000) ("BTAA") (Powerex's activities are included in BC Hydro's service plans and service plan reports required to be made public by the responsible Provincial government minister each fiscal year). In addition, Powerex's books can be examined and reported on by the Province. FAA, R.S.B.C., ch. 138, § 8(2)(c)(ii); Financial Information Act, R.S.B.C., ch. 140, § 4 (1996); BTAA, R.S.B.C., ch. 23, § 20. Powerex's auditor is appointed in accordance with a plan approved by a committee of

the Provincial Legislative Assembly. Auditor General Act, R.S.B.C., ch. 2, § 10 (2003). The Auditor General, an officer of the Provincial Legislature, may, in certain circumstances, be required to report to the Provincial Legislative Assembly on aspects of Powerex's financial operations, including whether Powerex is "operating economically, efficiently and effectively." *Id.* § 11(8).

The Province also imposes employment policies on Powerex. The Province's Lieutenant Governor in Council directly appoints BC Hydro's board of directors, which in turn appoints the Powerex board. Pet. App. 58a-59a. The Province and BC Hydro exercise a high degree of supervisory power over Powerex through a host of management controls, including Provincial authority to approve the appointment of any outside directors to Powerex's board. JA233-235, 248. In addition, the Province supervises Powerex by establishing a BC Hydro risk management committee to outline the criteria for all Powerex transactions and recommend approval of trades falling outside those criteria; the Assistant Deputy Minister of the Provincial Treasury, an employee of the Province's Ministry of Finance, participates in the committee. See Pet. App. 28a, 59a. Powerex must also comply with Provincial guidelines for public employee compensation. JA241-242. Finally, BC Hydro acts as Powerex's treasurer and payroll agent. Pet. App. 59a.

- The Province benefits from any revenues generated by Powerex, which are integrated into the profits of BC Hydro.

Powerex's profits are not "private" profits in any relevant sense; rather, they are consolidated with the profits of BC Hydro. See JA215; see also BC Hydro, *2006 Annual Report,* at 83 (May 2006) ("The consolidated financial statements include the accounts of BC Hydro and its principal wholly owned operating subsidiar[y] Powerex Corp"), *available at* http://www.bchydro.com. The Province directs BC Hydro as to the method for the payment of income to the Province, which includes the

consolidation of net income from Powerex. See Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order of the Lieutenant Governor in Council No. 1125, § 3 (Nov. 27, 2003); see also JA215 (Province directs BC Hydro to pay directly to the Province up to 85% of its consolidated net income, which includes all of Powerex's income). Under the Budget Transparency and Accountability Act, applicable to Powerex as a "government organization," Powerex's actual and forecast revenues and expenses, along with those of BC Hydro, are consolidated into the Province's budget, quarterly reports, and financial statements. See BTAA, R.S.B.C., ch. 23, §§ 1, 5-6, 9-10.

Furthermore, as befitting a government company that is ultimately accountable to the public, Powerex follows a "conservative risk profile * * * defined through limits that are regularly reviewed by both the Powerex and BC Hydro Boards of Directors." BC Hydro, *2005 Annual Report*, at 81 (June 2005), *available at* http://www.bchydro.com. Likewise, at the time of removal BC Hydro set aside revenue (including profits from Powerex) in a "Rate Stabilization Account," from which BC Hydro drew in low-profit years to maintain low consumer prices. See BC Hydro, *2001 Annual Report*, at 11 (June 2001), *available at* http://www.bchydro.com. Thus, due in part to "trade activity from Powerex," BC Hydro's consumer rates did not rise from 1993 until 2004, when the Province's Utilities Commission authorized a modest 4.85% increase. British Columbia Utilities Commission, *In the Matter of British Columbia Hydro and Power Authority 2004/05 to 2005/06 Revenue Requirements Application and British Columbia Transmission Corporation Application for Deferral Accounts*, at 67 (Oct. 29, 2004), *available at* http://www.bcuc.com. Powerex's projected income also plays into the Province's calculations in setting BC Hydro's utility rates. JA215, 238. Thus, Powerex's activities have resulted in lower consumer rates and more affordable electricity for British Columbians.

Powerex's profits also represent a significant contribution to Provincial coffers. In 2000-01, for example, Powerex helped BC Hydro achieve almost $4.5 billion in revenue, which made up 69% of BC Hydro's total revenue for the 2001 fiscal year. Scott Simpson, *Market fired Powerex bonanza*, VANCOUVER SUN, at 1, May 18, 2002, *available at* Westlaw, PapersCan.

The financial interdependence between BC Hydro and Powerex also means that any business losses incurred by Powerex will ultimately be suffered by the Province's citizens, who are, in the end, the owners of BC Hydro and Powerex. In 2003, as the sole shareholder of BC Hydro, the Province recorded a potential $820 million liability on its books to account for the string of lawsuits in California against Powerex. Michael McCullough, *Olympics brings cheer to otherwise troubled year*, VANCOUVER SUN, at 3, Dec. 31, 2003, *available at* Westlaw, PapersCan; see also BC Hydro, *2006 Annual Report*, at 95 (noting that "BC Hydro is also exposed to credit risk as a result of the trade activities of Powerex"). Powerex's legal costs are likewise absorbed by BC Hydro and, in the end, the Province. As of 2003, BC Hydro and Powerex had expensed approximately $25 million in legal costs incurred in defending Powerex. BC Hydro, *2003 Annual Report*, at 95 (July 2003), *available at* http://www.bchydro.com; see also BC Hydro, *2006 Annual Report*, at 99 ("BC Hydro has recorded provisions for uncollectible amounts and legal costs" relating to the debts owed by California to Powerex, dating back to the 2001 California energy crisis).

Given the high degree of financial integration between the Province and Powerex, it is hardly surprising that members of the Provincial government treat Powerex as a government company, and are held accountable through the political process for Powerex's actions.[2] Indeed, the Ninth Circuit's conclusion

---

[2] See, *e.g.*, Official Report of the Debates of the Legislative Assembly

that Powerex is an independent and private company with a "high degree of independence from the government of British Columbia" (Pet. App. 16a) would flabbergast the Province's Legislative Assembly, which believes that "[t]he management of Powerex will make decisions in the best interests of British Columbians, in the best interests of BC Hydro, and in the best interests of keeping rates low across the province on where to buy electricity." Official Report of the Debates of the Legislative Assembly (Hansard), 38th Parliament, 2d Session, at 3934 (Apr. 24, 2006).

As this record clearly shows, the Ninth Circuit's refusal to grant "organ" status under the FSIA to Powerex was based on a mischaracterization of the nature of the entity and a fundamental misunderstanding of its treatment and status under Canadian law. A context-sensitive test broadly construing organ status, applied to an accurate understanding of Powerex's role in Provincial affairs, accords "organ" status to Powerex, and recognizes Powerex's entitlement to the FSIA's procedural protections.[3]

(Hansard), 36th Parliament, 5th Session, at 17718 (Apr. 9, 2001) (Provincial legislative assembly demanding answers from the Province's Minister of Energy, Mines and Petroleum Resources about the outstanding debts owed to Powerex from its California sales of electricity); Official Report of the Debates of the Legislative Assembly (Hansard), 34th Parliament, 4th Session, at 11368 (July 24, 1990) (Provincial legislative assembly requesting information on "what actions the Minister has taken to ensure that BC Hydro's domestic customers are not put at risk through the activities of Powerex"); see also JA233 (Powerex's CEO explaining that "Provincial government representatives * * * were continually questioned by their constituents as to why an agency of the Crown [Powerex] was continuing to sell power into California").

[3] The Ninth Circuit's decision also conflicts with Article 1102(1) of the North American Free Trade Agreement, which prohibits discrimination among member countries. NAFTA Art. 1102(1), 32 I.L.M. at 639. The

III. Applying Section 1447(d) to Cases Removed Under the Foreign Sovereign Immunities Act Would Expose Foreign States to Prejudice, Impair Foreign Relations, and Undermine Congress's Comprehensive Scheme for Transferring to the Federal Courts Issues of Foreign Sovereign Immunity

Appellate review of orders remanding suits removed under the FSIA is crucial to the protections that Congress has provided to foreign states and their instrumentalities. The FSIA guarantees, in particular, that foreign governmental entities will receive preferential, uniform treatment in the federal courts in respects that Congress has specified. Applying the jurisdictional bar of 28 U.S.C. § 1447(d) would deny that treatment based on nothing more than a single district judge's *erroneous* determination that a defendant is not an agency or instrumentality of a foreign state. Such a result would be deleterious to the interests of the Province and every other foreign sovereign. And it is not required by, or even consistent with, this Court's precedents.

A. Section 1447(d) provides that "[a]n order remanding a case * * * is not reviewable on appeal or otherwise," and generally bars appeals of remand orders issued under 28 U.S.C. § 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). By its very nature, Section 1447(d) shields from appellate review erroneous remand orders as well as correct ones. That inherent downside to the jurisdictional bar is counterbalanced in other contexts by gains in judicial economy.

Province agrees with the arguments in petitioner's brief (at 38-39): By treating substantially similar entities such as the Bonneville Power Administration and the Western Area Power Administration as sovereign entities while denying sovereign status to Powerex, the court accorded more favorable treatment to Powerex's American counterparts, thus discriminating between functionally similar domestic and foreign investors, in violation of NAFTA.

See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2152 (2006) (Section 1447(d) avoids "'prolonged litigation of questions of jurisdiction.'") (quoting *United States* v. *Rice*, 327 U.S. 742, 751 (1946)).

But Section 1447(d)'s downside would be especially severe in the FSIA context, where federal jurisdiction serves a uniquely important purpose. Specifically, to eliminate the threat of "local bias in civil caselaw involving foreign states," *In re Texas Eastern Transmission Corp.*, 15 F.3d at 1239, the FSIA guarantees foreign entities the right to bench trials in federal court, see 28 U.S.C. § 1441(d). In enacting that guarantee, Congress understood that "extinguish[ing] a demand for a jury trial" is a foreign entity's only sure protection against bias. H.R. Rep. No. 94-1487, at 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6632.

Bias is insidious; it can be triggered simply by a plaintiff's allegations – such as the present claim that Canadian companies abused blackout conditions that affected numerous Californians – rather than by explicit appeals to prejudice. A defendant, therefore, can reasonably harbor only a faint hope of successfully challenging a verdict tainted by prejudice. Moreover, because neither this Court nor state courts will revisit the basis for federal jurisdiction once state proceedings have begun, see *Metropolitan Cas. Ins. Co.* v. *Stevens*, 312 U.S. 563, 568-69 (1941); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991) (collecting cases from Oregon, Alabama, and Oklahoma), applying Section 1447(d) in the FSIA context would turn a single district court proceeding into a foreign entity's one and only opportunity for insulation from bias against foreign states.

In addition to inappropriately weakening the FSIA's protections for individual defendants, barring appellate review of FSIA remand orders would also needlessly damage U.S. foreign policy. Foreign relations "might be seriously affected if an American jury * * * displayed * * * bias in a lawsuit against an instru-

mentality of [a foreign] government." *Universal Consol. Cos., Inc.* v. *Bank of China*, 35 F.3d 243, 246 (6th Cir. 1994). Just as important, foreign policy would be impaired even by lawsuits that do *not* result in tainted verdicts. The FSIA's removal provision "spare[s] [foreign states] the affront * * * [of] being judged by a jury of laymen" – a nontrivial concern, given that "few foreign countries have civil juries." *In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir. 2006) (Posner, J.).[4]

Moreover, "the [FSIA] nonjury provision was intended to promote 'uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.'" *Bank of China*, 35 F.3d at 246 (quoting H.R. Rep. No. 94-1487, *supra*, at 13, 1976 U.S.C.C.A.N. at 6611). "Uniformity in decision" assures each foreign state that its FSIA protections will be predictable and no weaker than the protections afforded every other foreign state. That uniformity will be impossible to attain, however, if the FSIA's protections are subject to the unreviewable, atomistic determinations of the federal district courts. Unless those determinations can be appealed, the primary purposes of the FSIA's removal provision – establishing respectful, uniform treatment of foreign states that insulates them from prejudice – will be undermined.

B. Section 1447(d) does not mandate the unraveling of this or any federal statutory scheme. Rather, as this Court recently explained, Section 1447 must be "read together with * * * later enacted" provisions concerning federal jurisdiction, such as the FSIA's removal provision. *Osborn* v. *Haley*, 127 S. Ct. 881, 895

---

[4] The Province, unlike many other non-U.S. jurisdictions, does have civil juries. See British Columbia Supreme Court Rules, Civil Rules 39(24) - (26), B.C. Reg. 221/90. But the construction of Section 1447(d) this Court adopts in this case will apply to *all* foreign sovereigns.

(2007).[5] *Osborn* addressed the Westfall Act's certification provision, which states that, in lawsuits seeking recovery from the United States for the conduct of federal employees acting within the scope of office of employment, "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). Quite obviously, that provision "renders * * * dispositive" the Attorney General's certification of a federal employee's scope of office or employment for purposes of establishing the United States' right to removal under the Westfall Act. *Osborn*, 127 S. Ct. at 894. But *Osborn* did more than simply acknowledge that it is error for a district court to issue a remand order in spite of a Section 2679(d)(2) certification. Rather, the Court also held that, to give "'conclusive'" effect to the Attorney General's prerogative to determine federal jurisdiction, certification under Section 2679(d)(2) must "*prevail*" over the Section 1447(d) jurisdictional bar. *Ibid.* (emphasis added). Thus, the Court held that a remand order contradicting the Attorney General's certification is not only erroneous but also *appealable*.

Like the Westfall Act, the FSIA also reflects a congressional determination that suits implicating sovereign interests should reside exclusively in the federal courts. The Westfall Act expresses that determination through a targeted grant of authority to the Attorney General, whom it empowers to define the scope of federal employment "for purposes of removal" only. 28 U.S.C. § 2679(d)(2). The FSIA, meanwhile, effects a broader transfer of authority to the federal judiciary as a whole, which the FSIA tasks with adjudicating the bounds of sovereign

---

[5] The FSIA was enacted in 1976, whereas the bar to appellate review of remand orders dates to 1887. See *Thermtron*, 423 U.S. at 343. It is inconceivable that the jurisdictional bar was intended to encompass cases removed by foreign states, given that suits against foreign sovereigns were unknown to the common law. See *Ruggiero* v. *Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 880-881 (2d Cir. 1981).

immunity. Indeed, the FSIA's overarching purpose is "to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden*, 461 U.S. at 497.

"[T]he jurisdictional provisions of the [FSIA] are simply one part of this comprehensive scheme." *Verlinden*, 461 U.S. at 496. It is no accident, therefore, that the purposes of the FSIA's nonjury removal provision – ensuring fair, consistent treatment of foreign sovereigns – mirror the reasons for the FSIA's broader command that the Judicial Branch field all questions concerning foreign sovereign immunity. See 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."); H.R. Rep. No. 94-1487, *supra*, at 7, 1976 U.S.C.C.A.N. at 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made purely on legal grounds and under procedures that insure due process."); *Nolan* v. *Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990) ("[T]he intent of the FSIA was to render uniform in procedure and substance the treatment of foreign sovereigns subjected to suits in American courts. Assuring the availability of a federal forum was intended to further these goals, to which a broad removal provision contributed.") (citing 14 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 3662, at 394 (1984)).

The FSIA's channeling of sovereign immunity questions to the federal courts is powerful evidence that the FSIA's removal provision must prevail over any postulated inconsistent reading of Section 1447(d). Cf. *Osborn*, 127 S. Ct. at 896 ("Only in the extraordinary case in which Congress has ordered the intercourt

shuttle to travel just one way – from state to federal court – does today's decision hold sway."). Whereas Section 1447(d) is designed to avoid protracted litigation concerning the grounds for federal jurisdiction, the FSIA's aim is just the opposite; it *encourages* extensive litigation in federal court concerning substantive questions of foreign sovereign immunity – including the question whether a defendant is an organ of a foreign state entitled to a bench trial in federal court. Applying Section 1447(d)'s jurisdictional bar, therefore, would contravene Congress's express purpose by permitting foreign entities to be shuttled into state court through a statutory back door. Congress could not have intended that remarkable result; and, as interpreted by *Osborn* and its predecessors, Section 1447(d) does not require it.[6]

---

[6] In the procedural posture of this case, Section 1447(d) does not apply to the district court's remand order for the additional reasons stated by petitioner: there was no defect in subject-matter jurisdiction at the time this case was removed from state court, and the district court in fact did not lose subject-matter jurisdiction after resolving the sovereign immunity issues concerning defendants other than Powerex. The Province addresses the broader issue of the statutory interplay between Section 1447(d) and the FSIA, however, because foreign sovereigns such as the Province are in need of a clear statement from this Court that they and their "organs" may appeal erroneous remand orders by district courts.

CONCLUSION

The judgment of the court of appeals for the Ninth Circuit should be reversed to the extent that it held that the district court properly remanded this case to state court because Powerex is not a "foreign state" protected by the FSIA.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
RACHEL S. LI WAI SUEN
MATTHEW R. SEGAL
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.,Suite 411
Washington, D.C. 20006
(202) 775-4500

MARCH 2007